

Public Land and Resources Law Review

Volume 18

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Recommended Citation

18 Pub. Land & Resources L. Rev. 213 (1997)

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NOTES

“MORAL OBLIGATIONS OF THE HIGHEST RESPONSIBILITY AND TRUST:”* AN ANALYSIS OF THE FEDERAL TRUST RESPONSIBILITY IN *PARRAVANO v. BABBITT*

Anne-Marie Lombardi**

I. INTRODUCTION

In *Parravano v. Babbitt*,¹ the United States Court of Appeals for the Ninth Circuit reviewed commercial fishers' allegation that the Secretaries of Commerce and Interior violated the Magnuson Act² by improperly reducing the ocean harvest rate of Klamath chinook salmon. The court ruled that the Secretaries properly reduced the ocean harvest in light of threats to Native American fishing rights. The case raised several significant issues, including the federal government's responsibility to protect tribal resources.³ This note analyzes the court's interpretation of the federal trust responsibility in *Parravano* and examines whether the Secretaries' actions set an example for fisheries management that fulfills the federal government's trust responsibility to Native American tribes.

Part II of this note provides a brief explanation of the Magnuson Act, the applicable statute in *Parravano*. Part II also outlines the history of the *Parravano* district court cases and explains the evolution of the federal trust relationship as it pertains to tribal rights. Part III examines the Ninth Circuit's decision in *Parravano*, focusing on the nature of federally reserved tribal fishing rights and the federal government's responsibility to protect these rights. Finally, Part IV concludes that the federal trust relationship is as an important legal tool for tribes to enforce federally re-

* *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (Murphy, J. for the majority).

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1. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996).

2. Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1994).

3. See *Parravano*, 70 F.3d at 547 (“We have noted, with great frequency, that the federal government is the trustee of Indian tribes' rights, including fishing rights.”).

served rights, and serves as a guiding principle by which federal officials may manage natural resources in a way that respects tribal interests.

II. BACKGROUND

A. *The Magnuson Act*

In 1976, Congress passed the Fishery Conservation and Management Act,⁴ or Magnuson Act,⁵ as a response to overfishing and insufficient fishery conservation in coastal waters.⁶ The Magnuson Act established regional councils that develop fishery management plans which are submitted to the United States Secretary of Commerce.⁷ The Secretary reviews the plans for compliance with the Act's seven "national standards" and "any other applicable law."⁸ The Magnuson Act authorizes the Secretary to approve or disapprove the councils' plans⁹ and to issue emergency regulations that alter a regional council's plan if fisheries are jeopardized.¹⁰ The Magnuson Act's requirement that the plan comply with "any other applicable law" has been judicially interpreted to include the United States' legal obligations to Native American tribes with regard to fishing rights.¹¹

4. Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801-1882 (1994)).

5. Originally named the Fishery Conservation and Management Act, the act was renamed the Magnuson Fishery Conservation and Management Act in honor of its original sponsor, the late Washington Senator, Warren Magnuson. Catherine E. Decker, *Issues in the Reauthorization of the Magnuson Fishery Conservation and Management Act*, 1 OCEAN & COASTAL L. J. 323 n.1 (1995) (citing Pub. L. No. 96-561, § 238, 94 Stat. 3300 (1980) (amending 16 U.S.C. § 1801)). The act is commonly referred to as the Magnuson Act.

6. 16 U.S.C. § 1801(a)(1),(2).

7. § 1852(a),(h)(1).

8. § 1854(a)(1)(B).

9. § 1854(a)(1)(A).

10. § 1855(c).

11. *Parravano v. Babbitt*, 837 F. Supp. 1034, 1041 (N.D. Cal. 1993). Courts have interpreted the provision "any other applicable law" as including treaties made between the United States government and Indian tribes. *See, e.g., Hoh Indian Tribe v. Baldrige*, 522 F. Supp. 683, 685 (W.D. Wash. 1981) ("The [Magnuson Act] requires that any fishery management plan must contain the conservation and management measures which are consistent with the national standards set forth in . . . the [Magnuson Act], and any other applicable law[,] including applicable treaties with Indian tribes."). In *Washington State Charterboat Ass'n v. Baldrige*, the court stated, "the Magnuson Act expressly provides that each fishery management plan approved by the Secretary shall be consistent with all provisions of the Act and 'any other applicable law.' Such 'other law' includes the Stevens treaties." 702 F.2d 820, 823 (9th Cir. 1983). The Stevens treaties are those treaties negotiated by Issac Stevens, Washington's Territorial Governor, with the Pacific Northwest tribes in 1854-1855. *See* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 450 (1982 ed.).

B. Fisheries Conservation Measures on the Klamath River

The Klamath River chinook salmon are anadromous fish¹² that spawn in the upper reaches and tributaries of the Klamath River.¹³ The Klamath River runs across the northwestern corner of California, and through the Hoopa Valley and Yurok Indian Reservations¹⁴ before it empties into the Pacific Ocean.¹⁵ Excessive water diversions, overfishing, and habitat degradation have required that the Klamath salmon harvest be severely curtailed, leading to conflicts among those with competing interests in the fishery: commercial fishers, sport fishers and the Hoopa Valley and Yurok Tribes (Tribes).¹⁶ Two government entities have jurisdiction over the fisheries resources: the United States Department of Interior has authority to set harvest levels for Klamath salmon on the Hoopa Valley and Yurok Reservations;¹⁷ the U.S. Department of Commerce, working with the Pacific Fishery Management Council, has authority to set ocean harvest levels within the Exclusive Economic Zone, two to three hundred nautical miles offshore.¹⁸

From 1990 through 1992, the Pacific Fishery Management Council set escapement¹⁹ and ocean harvest levels far below the minimum levels necessary to preserve the Klamath salmon fishery.²⁰ Recommended es-

12. Anadromous fish are those that hatch in rivers and migrate to the ocean, where they live before returning to the rivers of their origin to reproduce. *Parravano v. Babbitt*, 861 F. Supp. 914, 924 (N.D. Cal. 1994).

13. *Parravano*, 70 F.3d 539, 542 (9th Cir. 1995).

14. The Yurok Tribe originally occupied the Klamath River Reservation, located along the lower 20 miles of the Klamath River. *Parravano*, 861 F. Supp. at 919. The Klamath River Reservation was established by an executive order issued by President Pierce in 1855. The Hoopa Valley Reservation, established in 1876 by President Grant's executive order, was located on both sides of the Trinity River and was occupied primarily by Hoopa Indians. In 1891, President Harrison issued an executive order that extended the Hoopa Valley Reservation to encompass the Klamath River Reservation, thereby joining the two reservations. In 1988, Congress enacted the Hoopa-Yurok Settlement Act, which partitioned the extended Hoopa Valley Reservation into two separate reservations: the Hoopa Valley and Yurok Reservations. The legislative history that accompanied the partition act indicates that tribal fishing rights were a recognized asset to be held in trust by the United States for both the Hoopa Valley and Yurok Tribes. *Id.* at 919-20.

15. *United States v. Wilson*, 611 F. Supp. 813, 815 (N.D. Cal. 1985).

16. *Parravano*, 861 F. Supp. at 917.

17. *Parravano*, 837 F. Supp. at 1040 (citing Pacific Coast Fed'n of Fishermen's Ass'n, Inc. v. Secretary of Commerce, 494 F. Supp. 626, 633 n.5 (N.D. Cal. 1980)).

18. *Parravano*, 837 F. Supp. at 1040. The coastal states have jurisdiction between the coast and three nautical miles offshore. The "exclusive economic zone" begins at the outer limits of the state territorial waters and extends to 200-300 nautical miles offshore. *Id.*

19. Spawning escapement refers to the number of fish that are allowed to escape ocean and river harvest so that they can return to their places of origin to reproduce. *Parravano*, 837 F. Supp. at 1041 n.6.

20. *Id.* at 1042. In 1984, the Pacific Fishery Management Council recommended, and the Commerce Secretary adopted, the "Final Framework Plan," a multi-year management plan for ocean salmon fisheries. The minimum standards for escapement were set forth in Amendment Nine of the Final

capement was set at 35% of harvestable fish, with a minimum escapement of 35,000 naturally spawning adults in any one year.²¹ The Council's repeated failure to meet the minimum standards forced the Interior Department to critically reduce salmon harvesting on the Hoopa Valley and Yurok Reservations to conserve the species.²²

In 1993, the Secretaries of Interior and Commerce met to coordinate regulation of the Klamath salmon harvest, seeking a more equitable harvest distribution between the Hoopa Valley and Yurok Tribes and the ocean fishers.²³ That same year, the Pacific Fishery Management Council submitted a management plan that provided for a 35,000 escapement level, a 22% ocean harvest rate and a 32.5% in-river harvest for the Hoopa Valley Reservation.²⁴ Commerce Secretary Brown rejected that plan because it would compromise either conservation measures or the Tribes' fishing rights.²⁵ Instead, he issued an emergency regulation and alternate management plan that raised the escapement level to 38,000 and reduced ocean harvest to 14.5%, allowing the Tribes 44.6% of the total annual salmon harvest.²⁶

After Secretary Brown issued the emergency regulation, commercial fishers and fishing associations (Parravano), brought an action against the Secretary alleging that he violated the Magnuson Act by not complying with the Act's National Standards and improperly issuing the emergency regulation.²⁷ The United States District Court for the Northern District of California ruled in favor of the Commerce Secretary.²⁸ Judge Thelton E. Henderson, writing for the court, held that the Secretary could rationally conclude that the Pacific Fishery Management Council's recommendations were inconsistent with the Secretary's obligation to prevent overfishing; therefore, the Secretary had not acted arbitrarily or capriciously in rejecting the Council's recommendations.²⁹ In fact, the court found

Framework Plan. *Id.* at 1041 (citing 50 C.F.R. § 661 app. at IV.A (1992)). The "escapement floor" is the minimum number of salmon that must escape harvest and reproduce in order to prevent the long-term decline of the species. *Id.* The escapement levels fell below one-third of the minimum escapement level of 35,000 from 1990-1992: escapement was 15,500 in 1990, 11,500 in 1991 and 11,100 in 1992. *Id.* at 1042 & n.9.

21. *Parravano*, 837 F. Supp. at 1041.

22. *Parravano*, 70 F.3d at 543.

23. *Id.* Secretary Babbitt asserted that the Tribes were entitled to 50% of the total annual Klamath salmon harvest and to meet this goal, ocean fishing would need to be curtailed so that a sufficient number of fish could reach the Klamath River for harvest and spawning. *Id.*

24. *Parravano*, 837 F. Supp. at 1043.

25. *Id.* The 35,000 escapement and 22% ocean harvest rate did not provide for the levels necessary to reserve 50% of the harvest for the Hoopa Valley and Yurok Tribes' Klamath River fisheries. *Id.*

26. *Id.*

27. *Id.* at 1039.

28. *Id.* at 1048.

29. *Id.* at 1044. Under the Magnuson Act, 16 U.S.C. § 1855(b), the Commerce Secretary's

that in attempting to achieve an optimum yield from the fishery, the Secretary was "required to consider the requirements of the Indian in-river fishery" and "entitled to reject the Council's . . . recommendations because [they failed] to compensate for sufficient in-river Indian harvest."³⁰

In 1994, the *Parravano* plaintiffs brought another action in the district court. They claimed that no federal law reserves fishing rights to the Hoopa Valley and Yurok Tribes which the Commerce Secretary must consider "applicable law" within the meaning of the Magnuson Act.³¹ Judge Henderson again found for the Commerce Secretary, holding that: (1) the Hoopa Valley and Yurok Tribes have a federally reserved fishing right;³² (2) fishing rights created by statute or executive order have equal weight with those created by treaty;³³ and (3) it was appropriate for the Commerce Secretary to regulate the ocean harvest of Klamath salmon to provide a sufficient harvest for the Hoopa Valley and Yurok Reservation fisheries.³⁴

Most importantly, the district court acknowledged the federal government's role in protecting tribes' federally reserved rights from infringement by competing interests.³⁵ The court further acknowledged that such protection requires coordinated management by federal agencies with jurisdiction over resources in which the tribes have a federally reserved interest,³⁶ or with authority over actions that might adversely affect those resources.³⁷ The district court's comprehensive record implicitly referred to the federal government's trust responsibility to the Hoopa Valley and

decision is judicially reviewable, but will be overturned only if the court finds the Secretary acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 1041-42 (citing the Administrative Procedure Act, 5 U.S.C. § 706(2) (1982)).

30. *Parravano*, 837 F. Supp. at 1046.

31. *Parravano*, 861 F. Supp. at 918.

32. *Id.* at 922-23.

33. *Id.* at 923.

34. *Id.* at 924-25.

35. *Id.* at 925. As the district court noted, "the Government has 'recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries.'" *Id.* (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979)). The court added: "The Court is also mindful that '[t]he United States, acting through the Secretary of the Interior, has charged itself with moral obligations of the highest responsibility and trust [towards reservation Indians].'" *Id.* (quoting *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972)).

36. *Parravano*, 861 F. Supp. at 925 ("[T]he Secretary of Commerce must manage the ocean fishery in a manner consistent 'with any other applicable law,' 16 U.S.C. § 1854(a)(1)(B), which . . . we construe as including United States [sic] obligations to Indian reservations with respect to fishing rights . . . [and] requir[ing] that any optimum yield [set by the Commerce Secretary] must take into account the Indian Fishery on the Klamath River.").

37. *Id.* at 924 ("[F]or the Tribes' federally reserved fishing right to have any practical meaning, it must include regulation of activities occurring outside the reservation which negatively impact that right.").

Yurok Tribes, an important point of discussion in the later Ninth Circuit decision. The trust responsibility, as recognized by Judge Henderson and later by the appeals court, has developed into a significant legal tool for tribes seeking to enforce federally reserved rights.

C. Federal Trust Responsibility Toward Native American Tribes

The federal trust responsibility toward Native American tribes evolved judicially, beginning with Chief Justice Marshall's decisions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.³⁸ In *Cherokee Nation*, the Cherokee Tribe filed an action against the United States to enjoin the enforcement of Georgia state laws on tribal lands.³⁹ The Court believed that it lacked original jurisdiction because the Tribe was neither a state nor a foreign nation.⁴⁰ Justice Marshall characterized Native American tribes' status as "domestic dependent nations" with a "relation to the United States government [which] resembles that of a ward to his guardian."⁴¹ In *Worcester v. Georgia*, Justice Marshall further elaborated upon the guardian-ward relationship.⁴² The trust principles articulated by Justice Marshall have been applied throughout the twentieth century to establish and protect the rights of Native American tribes, making the trust relationship "one of the primary cornerstones of Indian law."⁴³

Federal courts have interpreted this trust relationship to protect tribal rights, construing ambiguous treaty language in favor of the tribes.⁴⁴ Courts have extended important protections, such as reserved water rights

38. See COHEN, *supra* note 11, at 220; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

39. 30 U.S. (5 Pet.) at 1.

40. *Id.* at 16. The United States Supreme Court's original jurisdiction extends only to cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." U.S. CONST. art. III, § 2, cl. 2. The Court's appellate jurisdiction includes "Controversies between two or more States . . . [or] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

41. 30 U.S. (5 Pet.) at 17.

42. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 552 ("[The United States] receive the Cherokee nation into their favour and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power.").

43. COHEN, *supra* note 11, at 220-21.

44. *Id.* at 222. For example, in *United States v. Winans*, 198 U.S. 371 (1905), the United States brought suit on behalf of the Yakima Nation to enjoin the respondents, non-Indian fishers and landowners, from obstructing the Yakimas' off-reservation fishing rights. Through an 1859 treaty with the United States, the Yakimas acquired exclusive fishing rights within the reservation boundaries and off-reservation rights at "usual and accustomed" places. *Id.* at 378. Respondents contended that the treaty provided no special off-reservation fishing rights. *Id.* at 379. The Supreme Court held that the treaty secured off-reservation fishing rights that permitted the Yakimas to cross privately-owned lands to access their traditional fishing places. *Id.* at 381-82. The Court declared that Indian treaties would be construed "as [the Indians] understood [them] and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.'" *Id.* at 380.

or rights to hunt and fish, based upon treaties and other agreements that created Indian reservations.⁴⁵ The courts' protective approach acknowledges the unequal bargaining position and communication difficulties between the federal government and the tribes when creating treaties.⁴⁶ The courts have refused to permit abrogation or modification of these reserved rights without express congressional intent.⁴⁷

The federal trust responsibility imposes strict fiduciary standards upon all federal agencies that interact with tribes and requires federal officials to administer regulations and statutes so as to protect tribal rights.⁴⁸ *Pyramid Lake Paiute Tribe v. Morton*⁴⁹ illustrates the application of trust principles to federal agency conduct. In *Pyramid Lake*, the federal district court struck down a regulation which allowed for certain water diversions that adversely affected Pyramid Lake, located downstream on the Pyramid Lake Indian Reservation.⁵⁰ The court stated that the United States, "acting through the Secretary of Interior, 'has charged itself with moral obligations of the highest responsibility and trust . . . [and its] conduct . . . should therefore be judged by the most exacting fiduciary standards.'"⁵¹ The court ruled that the Interior Secretary had an affirmative duty to protect the Paiute Tribe's water rights to the fullest extent possible within his authority.⁵²

The federal trust responsibility assumes special significance in conflicts between tribal and non-tribal interests over natural resources managed by federal agencies.⁵³ The federal courts continue to decide impor-

45. COHEN, *supra* note 11, at 221-22.

46. See *United States v. Washington*, 384 F. Supp. 312, 330-31, 355-56 (W.D. Wash. 1974) (explaining the history and process of treaty-making in Washington Territory and the difficulties in translation between the United States' negotiators and the tribes).

47. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). The Court in *Menominee* considered whether the Menominees' fishing and hunting rights were extinguished by the Termination Act of 1954. The Court held that the Tribe's fishing and hunting rights were preserved because the Court found no explicit congressional intent to abrogate the Tribe's rights. The Court stated that although Congress has the power to abrogate Indian hunting and fishing rights, an intention to abrogate such rights would not be "lightly imputed." *Id.* at 413. See also *United States v. Dion*, 476 U.S. 734, 745 (1986) (finding clear congressional intent that the Eagle Protection Act abrogated Indian treaty rights to hunt bald eagles based on the act's provision allowing "take" permits for tribal religious purposes, and based on the legislative history of the act); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (holding that the Endangered Species Act (ESA) abrogated Indian treaty rights to hunt the endangered Florida panther based on precedent which held that treaty rights do not extend to the "point of extinction," and on the ESA's legislative history and express exceptions for Alaskan Natives).

48. COHEN, *supra* note 11, at 227.

49. 354 F. Supp. 252 (D.D.C. 1973).

50. *Id.*

51. *Id.* at 256 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

52. *Id.*

53. Opposing parties' interests may be governed by separate federal agencies, which may fur-

tant cases in which tribal interests clash with non-tribal interests.⁵⁴ *Parravano v. Babbitt* is one of the more recent cases in which the courts rely upon the trust responsibility as a source of authority for upholding tribal fishing rights against non-tribal commercial interests.

III. PARRAVANO V. BABBITT

In 1995, the Court of Appeals for the Ninth Circuit reviewed the district court decisions in *Parravano v. Babbitt*.⁵⁵ On appeal, Parravano contended that the Commerce Secretary, in issuing the emergency regulation, erroneously considered fishing rights reserved to the Hoopa Valley and Yurok Tribes.⁵⁶ Parravano argued that the Tribes do not possess federally reserved fishing rights because their rights arise from executive orders, not treaties.⁵⁷ Parravano also argued that the Tribes do not possess federally reserved rights that constitute "any other applicable law" under the Magnuson Act, and that the Commerce Secretary should not consider the Tribes' rights in the administration of the Magnuson Act.⁵⁸

The Ninth Circuit Court disagreed and held that the Secretary of Commerce properly issued the emergency regulation.⁵⁹ The Ninth Circuit opinion examines two primary issues: first, the nature of federally reserved tribal fishing rights and second, the federal government's responsibility to protect reserved tribal fishing rights.

A. *The Nature of Federally Reserved Fishing Rights*

The Ninth Circuit rejected Parravano's argument that the Hoopa Valley and Yurok Tribes possess no federally reserved fishing rights that constitute "other applicable law" within the meaning of the Magnuson Act.⁶⁰ Parravano attempted to distinguish between tribal fishing rights

ther complicate and seriously undermine federal agencies' trust responsibility to Native American tribes. See COHEN, *supra* note 11, at 227-28.

54. See, e.g., *United States v. Dion*, 476 U.S. 734 (1986) (U.S. Fish & Wildlife Service arrested tribal member for killing bald eagles in violation of the Endangered Species Act and Eagle Protection Act; the Court held that the EPA abrogated Indian treaty rights to hunting, but did not reach the issue of whether ESA did the same); *United States v. Wilson*, 611 F. Supp. 813 (N.D. Cal. 1985) (holding that Interior Department's moratorium on commercial fishing on the Klamath River, intended for conservation purposes, impermissibly abrogated Indian tribal rights to hunt and fish on the Hoopa Valley Reservation).

55. 70 F.3d 539 (1995) (reviewing *Parravano v. Babbitt*, 837 F. Supp. 1034 (N.D. Cal. 1993) and 861 F. Supp. 914 (N.D. Cal. 1994)).

56. 70 F.3d at 544.

57. *Id.*

58. *Id.*

59. *Id.* at 547.

60. *Id.* at 544.

arising from executive orders and those arising from treaties.⁶¹ The court rejected that distinction on three principles. First, the court found that "a treaty/executive order distinction has no historical or legal significance with respect to the Tribes involved in [this case]."⁶² Second, the court noted that courts have consistently rejected distinctions between tribal rights created by treaty and those created by executive orders because such distinctions ignore the purpose of setting aside reservations "for Indian purposes."⁶³ Finally, the court found that a treaty/executive order distinction "is inconsistent with the well-established federal trust obligation owed to the Indian tribes."⁶⁴

The court discussed the second and third principles at length, explaining federal judicial policy regarding tribal rights. The court noted that historically, courts have found no significant, qualitative distinction between tribal rights created through treaty, executive order, or statute.⁶⁵ The court correctly reasoned that all are federally created rights and merit protection against non-federal interests.⁶⁶ The court pointed out that when the federal government set aside reservations "for Indian purposes," hunting and fishing rights were impliedly included in those Indian purposes.⁶⁷ The creation of the Hoopa Valley Reservation, by executive orders in 1876 and 1891, recognized hunting and fishing rights, including traditional salmon fishing.⁶⁸ The court found that the Tribes could not be dispossessed of these rights without express congressional intent.⁶⁹ Finding no such express intent, the court held that the Hoopa Valley and Yurok Tribes possess federally protected fishing and hunting rights, reserved to them through the creation of the Hoopa Valley Reservation.⁷⁰

61. *Id.*

62. *Id.* The court explained: "We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute, or executive order, unless Congress has provided otherwise With respect to the Hoopa Valley and Yurok Tribes, the California courts concluded nearly two decades ago that, as against non-federal interests, tribal rights derived from executive order are treated the same as treaty rights." *Id.* at 545 (citations omitted). The court further explained that the process of creating reservations by treaty ended in 1871, after which reservations were created by statute, or until 1919, by executive order. *Id.* Regardless of the source of authority for creating reservations, the federal courts have understood that "hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes." *Id.* at 545-46.

63. *See id.* at 544-46.

64. *Id.* at 544.

65. *Id.* at 545.

66. *Id.*

67. *Id.* at 545-46.

68. *Id.*

69. *Id.* at 546.

70. *Id.* *See supra* note 14 (explaining the creation and subsequent partition of the Hoopa Valley Reservation). The Ninth Circuit Court noted that the 1988 Hoopa-Yurok Settlement Act, which partitioned the Reservation into the Hoopa Valley and Yurok Reservations, did not explicitly reserve fish-

B. *The Federal Government's Trust Responsibility
to Protect Tribal Rights*

After holding that the Hoopa Valley and Yurok Tribes possess federally reserved fishing rights, the court explained the federal government's responsibility to enforce these rights. This responsibility, the court said, "extends not just to the Interior Department, but attaches to the federal government as a whole."⁷¹ The court attributed this viewpoint to Judge Beezer, whose concurring opinion in *United States v. Eberhardt*⁷² charged the entire federal government with a trust responsibility toward Native American tribes.⁷³

In *Eberhardt*, members of the Yurok Tribe were charged with illegally catching and selling anadromous fish, in opposition to a moratorium banning commercial fishing on the Hoopa Valley Reservation.⁷⁴ The court in *Eberhardt* held that the Interior Department had authority to regulate the reservation fisheries consistent with its trust duty to preserve and protect tribal resources.⁷⁵ In a concurring opinion, Judge Beezer criticized the "disjoined management" of the Klamath River fishery, noting that the Commerce Department and Interior Department separately managed the fishery "with an apparent lack of any coordination."⁷⁶ Judge Beezer concluded that adequate conservation necessitated coordinated regulation of harvests throughout the Klamath salmon's migration.⁷⁷ Judge Beezer noted that the Commerce Department's failure to enforce adequate conservation measures in coastal waters forced the Interior Department to impose the conservation burden disproportionately on the upstream Hoopa Valley and Yurok Tribes.⁷⁸ Judge Beezer accused both the Interior and Commerce Departments of failing to fulfill their federal trust responsibilities to the Tribes through the mismanagement of the Klamath River fisher-

ing rights. *Parravano*, 70 F.3d at 546. But the court also noted that Congress "recognized the importance of the Tribes' rights to fish along the Klamath River" and was "aware that each Tribes' interests in their salmon fisheries was one of its principal assets." *Id.* Faced with the ambiguities of this legislative history, the court construed the act in favor of the Tribes, finding no congressional intent to dispossess the Tribes of their rights. *Id.*

71. *Id.*

72. *United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir. 1986) (Beezer, J., concurring).

73. *Parravano*, 70 F.3d at 546.

74. *Eberhardt*, 789 F.2d at 1356. For conservation purposes, the State of California had prohibited commercial fishing on the Klamath River since 1933. *Id.* In 1979, the United States Department of Interior banned all commercial fishing and sales of anadromous fish taken by Indians on the Hoopa Valley Reservation. *Id.* at 1357 (citing moratorium regulation at 25 C.F.R. § 250.8(e) (1985)).

75. *Id.* at 1359-60.

76. *Id.* at 1363 (Beezer, J., concurring).

77. *Id.*

78. *Id.* As an example of the unfair conservation burden placed on the reservation Indians, Judge Beezer noted that between 1976 and 1984, 67% of the captured fish were harvested by commercial fisheries and only 8% by Indian gill net fishers. *Id.* at 1363 n.1.

ies and concluded that "[c]ooperation among all agencies of the government is essential to preserve those Indian fishing rights to the greatest extent possible."⁷⁹

C. *The Effect of the Parravano Decision*

Nearly a decade after the *Eberhardt* decision, *Parravano* indicates that the Interior and Commerce Departments have finally achieved the kind of coordinated management advocated by Judge Beezer. This coordinated management of the Klamath fisheries by Interior and Commerce acknowledges the migratory nature of the Klamath salmon and the harvest limits necessary to preserve the Tribal fisheries. Because ocean over-harvesting significantly decreases the number of salmon that survive to spawn, a greatly reduced number of Klamath salmon are available for the upstream Tribes' harvest.⁸⁰ In the past, the Interior Department responded to the crisis of species deterioration by restricting tribal fishing, unfairly imposing the conservation burden on the Tribes.⁸¹

Moreover, when the Departments of Commerce and Interior failed to coordinate the ocean and upstream harvests and equally parse the conservation responsibilities, the long-term survival of the Tribal fisheries was jeopardized.⁸² The Interior Department has a well-established duty to preserve and protect tribal resources as part of its federal trust responsibility.⁸³ As Judge Beezer noted, the Interior Department cannot accomplish this goal in a vacuum; fulfilling this responsibility requires the cooperation of other federal agencies, namely Commerce, which concurrently administers the same resources.⁸⁴

Parravano is consistent with Indian law decisions of the Ninth Circuit honoring reserved tribal hunting and fishing rights and upholding the federal government's trust responsibility to ensure protection of these rights. In *Parravano*, the Ninth Circuit acknowledged that the federal government fulfills its trust responsibility only through a unified effort among its agencies to protect tribal interests. The court reaffirmed that the federal trust responsibility attaches to the whole federal government, not only to certain individual agencies.⁸⁵

The *Parravano* decision also follows well-established principles of judicial review of administrative decisions and as such, offers a fairly

79. *Id.* at 1363-64.

80. *See supra* note 12 (describing the biological cycle of anadromous fish).

81. *Parravano*, 70 F.3d at 547.

82. *See id.*

83. *United States v. Eberhardt*, 789 F.2d at 1360-61.

84. *See supra* notes 76-79 and accompanying text.

85. *Parravano*, 70 F.3d at 546.

predictable result. The judicial standard for invalidating the Secretary of Commerce's action required that the action be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸⁶ The court found no such basis for invalidating the Commerce Secretary's action and ruled that Secretary Brown's actions fit within "any other applicable law," specifically, his trust responsibility to the Hoopa Valley and Yurok Tribes. This is a distinguishing feature of *Parravano*: although the Commerce Secretary's powers to regulate salmon harvest under the Magnuson Act have been challenged numerous times, courts have not previously invoked the federal government's trust responsibility to Native American tribes as a basis for upholding the Secretary's actions.⁸⁷

Parravano presented unusual circumstances in which the Secretaries of Interior and Commerce jointly managed the annual harvest of the Klamath salmon. Prior to 1993, the Commerce Secretary regulated ocean harvest of the Klamath salmon without seriously considering the upstream Tribes whose harvest is determined by ocean harvest and escapement levels. In 1993, when Commerce Secretary Brown rejected the Pacific Fishery Management Council's plan because it failed to provide adequately for the upstream tribal harvest, the critical need for coordinated management was finally realized.⁸⁸ Moreover, through Interior Secretary Babbitt's advocacy, the Hoopa Valley and Yurok Tribes' allocated share of the annual harvest approached fifty percent,⁸⁹ a more equitable harvest share than the Tribes received in the past. The actions of Commerce Secretary Brown and Interior Secretary Babbitt demonstrated a commitment to tribal interests and fulfilled each department's federal trust responsibility to the Hoopa Valley and Yurok Tribes.

The *Parravano* decision creates precedent for future management of fisheries that recognizes and promotes tribal interests. The principle upon which Secretary Brown and Secretary Babbitt based their actions was the federal trust responsibility owed to Native American tribes. The trust responsibility has a long and dynamic history in federal government-tribal relations and will likely continue to operate as a principle that limits federal actions to prevent harm to tribal interests. However, commentators have

86. *Id.* at 543.

87. *See, e.g.,* Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1440 (9th Cir. 1991) (holding that neither the Magnuson Act nor its amendments require the Commerce Secretary to make an accounting of harvest allocation between treaty Indian and non-Indians before issuing the 1988 harvest plan); Washington State Charterboat Ass'n v. Baldrige, 702 F.2d 820, 823-24 (9th Cir. 1983) (holding that Magnuson Act did not abrogate treaty fishing rights under the Stevens treaties, and that the Stevens treaties precluded the Secretary from adopting an aggregate approach for salmon harvest allocation).

88. *See Parravano*, 70 F.3d at 546.

89. *See Parravano*, 837 F. Supp. at 1043.

pointed to the trust principle as something more than a mechanism to restrain federal actions. The trust responsibility has the capacity to protect Indian resources against potentially adverse federal activity,⁹⁰ or to serve as a guiding principle for federal agency action.⁹¹ In the future, the trust responsibility should play a larger role as a guiding principle, one that not only encourages federal agencies to better coordinate resource management decisions which affect tribal interests, but also increases awareness of tribal interests, and encourages tribal participation in natural resource management.⁹²

IV. CONCLUSION

The *Parravano* decision requires that federal officials acknowledge and protect tribal interests in furtherance of their federal trust responsibilities.⁹³ Commerce Secretary Brown and Interior Secretary Babbitt took the

90. See Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 171-73 (1996). Sanders notes that the trust responsibility imposes an obligation on the federal government to protect tribal interests which includes a duty "to investigate potential adverse impacts on treaty-secured resources" and requires "strict compliance with administrative policies [including] consultation with Indians." *Id.* at 172.

91. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471. Wood states:

[T]he trust doctrine is an important legal tool to protect native rights against adverse [federal] agency action. . . . The trust responsibility remains a focal point for tribes in their efforts to gain federal protection of native lands and resources. . . . Several agencies within the executive branch are now developing trust policies to guide their actions affecting tribes.

Id. at 1505-06. See also Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Towards the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733 (1995) [hereinafter *Executive's Trust Responsibility*]. Wood states:

[D]eveloping trust policy in the form of guidance documents still achieves the overriding goal of educating agency officials as to the nature of their trust responsibilities. . . . Even when fashioned as guidance documents, trust policies should provide the necessary measure of internal agency direction to prompt federal officials to fulfill their trust responsibility to tribes.

Id. at 753.

92. See Wood, *Executive's Trust Responsibility*, *supra* note 91, at 760. Wood reviews the current policies and practices of federal agencies whose actions affect tribes. Wood notes that the Clinton administration offers "a promising step toward fulfilling the nation's trust obligation toward tribes . . . [but the] effort is deficient in several important respects." *Id.* Wood reviews the policies and actions of the Departments of Interior, Agriculture, Energy, Justice, and the EPA, which have tremendous impact on tribal resources and their management. *Id.* Though these agencies have issued broad policy statements concerning their obligations to tribes, few have provided specific guidance on how they plan to implement such policy. *Id.* Wood points to the EPA, which has taken an inclusive approach in its encouragement of the development of tribal environmental programs, as a "useful model for gaining broad tribal involvement." *Id.*

93. Examples of cases in which courts have directed federal agencies to protect tribal interests include *United States v. Creek Nation*, 295 U.S. 103 (1935) (holding that the Creek Nation, a "depen-

federal trust responsibility seriously and used it to guide their management of the 1993 Klamath River salmon harvest. As a guiding principle, the trust responsibility directs federal agencies to consider tribal interests equally with other interests affected by agency action. The trust responsibility played this role in *Parravano*. In the future, federal agencies should use the trust responsibility as it was used by the Interior and Commerce Secretaries in *Parravano*: as a guiding principle that recognizes and protects tribal interests in federal natural resource management policies.

dent Indian community under the guardianship of the United States," was entitled to just compensation for lands erroneously surveyed by the U.S. General Land Office and improperly ceded to other tribes and settlers); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (holding that the Secretary of Interior and Commissioner of Indian Affairs violated treaties and their federal trust duties by continuing to disburse funds to tribal officials known by the federal government to have misappropriated tribal payments); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986) (finding that the Secretary of Interior, as trustee for Indian tribes, has the authority and an obligation to manage and conserve tribal resources for the benefit of the Indians); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (finding that the Secretary of Interior's fiduciary duty to tribes obligates the Secretary to liberally construe a water allocation agreement in favor of the Paiute Tribe and to resolve conflicting claims to water in a precise manner that would indicate the weight given to each interest in the water).